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Supreme Court, U.S.
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NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1987

JAMES L. WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER DUE PROCESS AND CONFRONTATION RIGHTS ARE DENIED BY UPHOLDING ON APPEAL THE INTRODUCTION OF EVIDENCE BASED ON AN EVIDENTIARY THEORY UNADVANCED AT TRIAL, WHERE THE ADVERSE PARTY WAS NOT GIVEN NOTICE AT TRIAL OF THE EVIDENTIARY THEORY LATER ASSERTED ON APPEAL.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 837 F.2d 1009 (February 17, 1988) and attached as Appendix A to this Petition. The District Court issued no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1988. An Order denying Defendant's Petition for Rehearing In Banc was entered on May 2, 1988 and is reprinted as Appendix B. The jurisdiction of this Court is invoked under 28 USC § 1254(1). The Judgment and Commitment Order is attached as Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The *Fifth Amendment* to the United States Constitution guarantees that: "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .".

The *Sixth Amendment* to the United States Constitution guarantees that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defense."

Rule 803(6), Federal Rules of Evidence, states:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness."

Rule 801(d)(2), Federal Rules of Evidence, states: "A statement is not hearsay if—The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity . . .".

STATEMENT OF THE CASE

James Williams was prosecuted by indictment and convicted of filing a false income tax return for the year 1979 (26 USC § 7206(1)) and for tax evasion for the years 1980 and 1981 (26 USC § 7201).

The government prosecuted this tax case under the net worth theory. The case boiled down to the source of money which funded the defendant's net worth increases. The government relied primarily on entries in the defendant's loan account which was on the books of Center Construction Co., a family business run by the Defendant and his father (Tr 12 840-881). The

government contended that these funds were generated from commercial bingo games. Williams was an officer and stockholder of two corporations that were in the business of operating bingo games (Tr 8 84-85). The bingo games were sponsored by local charities, who made arrangements with Williams to rent the bingo hall and buy supplies (Tr 9 354-355, 375-378). The charities would receive $150.00 for each bingo session they sponsored (Tr 354-355, 375-378). The bingo games were run by bingo employees (Tr 9 356, 382-383). There was no evidence that the defendant was present at the bingo games. Regardless of how many people attended the bingo games, the charity always received $150.00 (Tr 9 358).

The evidence concerning attendance, income, and expenses for the bingo games came from the "Income & Expense Report". Those records were offered and admitted, over defense objection, as *business records* of the Paralyzed Veterans of America, one of the charities that sponsored the bingo games with which Williams had no association. On direct appeal, "the government largely concede[d] that the [reports] were not admissible" as business records. *Williams*, 837 F.2d at 1012.

Several days after the Reports were improperly admitted under the business records exception, Williams' bookkeeper was called by the government for the purpose of establishing the accounting procedures of Williams' business (Tr 10 518). On the second day of her testimony and after reviewing for the jury numerous other documents, the prosecutor referred the witness to some of the Reports. The witness indicated that the

initial "J" or "JW" looked like Williams' handwriting (Tr 11 674).

The Eleventh Circuit's decision focused on that testimony in upholding the government's untimely argument on appeal that the Income and Expense Reports were admissible as *admissions* of the Defendant, under Rule 801(d)(2)(A). This evidentiary theory was never presented to the trial court.

REASONS FOR GRANTING THE WRIT

It is a fundamental denial of due process and the right of confrontation for the government to suggest on appeal an evidentiary basis to admit key documents, where that theory was not advanced at trial, thus denying the Defendant the opportunity to address the factual basis for admitting the documents.

Once the government introduced the Income and Expense Reports under the business record exception, the government made no attempt to introduce the documents under the non-hearsay admission theory later accepted by the Eleventh Circuit, but *not* addressed by the District Court or counsel for the Defendant at the trial level. Consequently, at trial there was no reason to confront or challenge the documents' admissibility at that time, since the government had already successfully admitted the documents. At the trial level, the defendant would have shown the Court that the documents were not admissible as an admission:

1. No individual testified that they saw the Defendant sign the Income and Expense Reports;

2. No individual testified that the documents were ever in the Defendant's possession;

3. A number of the documents were signed by an unidentified "X";

4. No individual identified the handwriting of the person who wrote the numbers on the Income and Expense Reports;

5. There was no testimony whether the initials were placed on the documents before or after the numbers were written; and, significantly,

6. The government presented contrary evidence in its case-in-chief as to whose initials appeared on the reports.

The result of the principle now established by the Eleventh Circuit is that in criminal cases, defendants will not be given proper notice and the opportunity to confront the basis for admission of evidence at the only factual forum available.

The proper time for the government to advance a theory of admissibility is at the trial level, where the defendant is given the only opportunity to confront the facts and develop the record. In its decision, the Eleventh Circuit relied upon *United States v. Rosenstein*, 474 F.2d 705 (2d Cir. 1973), concluding that where a trial court incorrectly admits evidence over the

well-founded objection of a defendant, the Court of Appeals can affirm the conviction even though the evidence was admissible under a theory not presented to the trial Court. The Eleventh Circuit misplaced its reliance on the *Rosenstein* opinion, and the Eleventh Circuit's decision is inconsistent with two Supreme Court decisions: *Sheppard v. United States*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933), and *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958).

SUPREME COURT PRECEDENT

In *United States v. Sheppard, supra*, the defendant stood accused of murdering his wife by poison. The government, in rebuttal, offered evidence that "Dr. Sheppard has poisoned me" and offered the testimony as the wife's dying declaration, for the truth of the matter asserted. The trial court admitted the evidence over objection.

On appeal, the government offered, and the court of appeals accepted, the government's new theory of admission of the statement, contending that the statement was admissible to show the wife's state of mind. This Court unanimously reversed the conviction, reasoning that the statement was inadmissible as a dying declaration, and that by hindsight, the government could *not* introduce the evidence for state of mind. The Court noted that by seeking to introduce the evidence based on that theory, the defendant was put "off his guard", because of the inconsistent and prejudiced purposes of the evidence and lack of a jury instruction. The Court states "[a] trial becomes unfair

if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected." *Sheppard*, 290 U.S. at 103, 54 S.Ct. at 25.

Similarly, in *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1957), the Court held that the government cannot support the admissibility of evidence on a theory raised for the first time on appeal because it would unfairly deprive the accused of an adequate opportunity to cross-examine the government's witnesses or adduce rebuttal evidence.

In *Giordenello*, the government sought to justify before the Court the defendant's arrest on a basis not asserted below. In rejecting the government's new theory the Court states:

> We do not think that these belated contentions are open to the Government in this Court and accordingly we have no occasion to consider their soundness. To permit the Government to inject its new theory into the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond. This is so because in the District Court petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no reason to cross-examine Finley or to adduce evidence of his own to rebut the contentions that the Government makes here for the first time.

Giordenello, supra, 357 U.S. at 488; 78 S.Ct. at 1251.

CONFLICTS WITH OTHER CIRCUITS

The Eleventh Circuit's decision conflicts with other circuits which have refused to consider theories of admissibility which were not raised below, because it deprives the defendant of his opportunity to argue the weight, trustworthiness, or to offer proof to controvert the facts relied upon by the court. In *United States v. Ordonez*, 737 F.2d 793 (9th Cir. 1984), the trial court improperly admitted ledgers in a drug case. On appeal, the government argued a new basis to support the introduction of the ledgers, and the court responded:

> At the time an objection was interposed concerning the admissibility of the entries as hearsay, the government did not suggest to the trial court that a proper foundation had been established under the co-conspirator exception. This theory was never advanced before the trial judge at any time during the trial. The trial court was not called upon to consider or to make any findings concerning the weight, sufficiency, and credibility of any foundational facts, independent of the expert's interpretation of the coded ledger entries, to prove the connection of the declarant to the conspiracy. Since this theory was not considered, we cannot now say that such evidence was *not* available. We decline to speculate on the state of this record that the trial court would have been satisfied that sufficient foundational facts were present to satisfy the co-conspirator exception, *if* the

> prosecutor had argued this theory in a timely manner. *For us to sustain a theory of admissibility not presented below, would unfairly rob appellants of the opportunity to argue the weight, sufficiency and trustworthiness of the evidence to establish a proper foundation before the trial judge, or to offer proof to controvert the facts now relied upon by the government.*

Ordonez, supra, 737 F.2d at 801 (emphasis added, in part).

Similarly, in *United States v. Check*, 582 F.2d 668, 681 (2d Cir. 1978), at trial, the government introduced testimony as nonhearsay evidence, but on appeal the government gave alternative theories for introduction of the testimony. The court states:

> We do not, however, find it necessary to decide whether Spinelli's testimony was admissible for either of these more limited purposes, for there is venerable precedent for disregarding the unseasonable advancement of such purposes to salvage evidence introduced by the government at a criminal trial when the grounds repeatedly advanced in the trial court differ markedly from those urged upon the appellate court.

Check, 582 F.2d at 681. *See, also, United States v. Salazar*, 805 F.2d 1394, 1399-1400 (9th Cir. 1986) (court refused to remand to district court for hearing on issue

which would have supported the search, where the new theory raised first time on appeal).

If the Eleventh Circuit's rationale were to prevail, then any statement (written or oral) that is introduced under Rule 803 or 804 (a total of 28 different exceptions to the hearsay rule) can be argued on appeal for the first time. Yet, every exception carries with it substantially different factual requirements. At stake is a party's constitutional right to receive proper notice and be given the opportunity to confront and cross-examine the requisites of proof that each exception dictates.

The record in this case is filled with doubts and contradictions concerning who signed the Reports and when they were signed; also, there is no evidence concerning the mysterious "X" appearing on the majority of the Reports; there was no evidence establishing Williams' knowledge of the information on the documents; no evidence concerning whether the documents were filled out in blank with initials at the bottom; and no testimony as to whether or not the Defendant acknowledged awareness of the information—only the government's hindsight recognition that the documents did not comport with the business record exception and an effort to offer a belated theory, *for which the Defendant cannot now develop a factual record to contradict.*

The procedure successfully advanced by the government opens the door to new appellate positions that are available to parties if they realize upon review of the record that the theory advanced at trial was erroneous. In the present case, the government failed

to provide the Defendant with appropriate notice and an opportunity to confront the admission of the evidence. As demonstrated, the Eleventh Circuit Court of Appeals' decision conflicts with applicable decisions of this Court. Rule 17.1(c), Supreme Court Rules. The decision also conflicts with decisions of other circuit courts. Rule 17.1(a), Supreme Court Rules.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LAWRENCE N. ROSEN

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MICHAEL J. ROSEN

MICHAEL J. ROSEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed to Ms. Gail Brodfuehrer, Department of Justice, Tax Division, Post Office Box 502, Washington, D.C. 20044, the Solicitor General, Department of Justice, Washington, D.C. 20530, and Strike Force, Department of Justice, 77 S.E. Fifth Street, Miami, Florida 331131, this 15th day of July 1988.

LAWRENCE N. ROSEN

LAWRENCE N. ROSEN

Appendix

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

James L. WILLIAMS,
Defendant-Appellant.

No. 87-5290.

United States Court of Appeals,
Eleventh Circuit.

Feb. 17, 1988.

Defendant was convicted in the United States District Court for the Southern District of Florida, No. 86-6059, James C. Paine, J., of tax evasion, and he appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) receipts from bingo games conducted by defendant were admissible, and (2) trial court did not improperly restrict defendant's cross-examination of government witness.

Affirmed.

1. Criminal Law —1134(6)

Receipts given to sponsoring charities by taxpayer, whose corporation conducted bingo games, were admissible in tax evasion prosecution as admissions by party opponent, though receipts had been erroneously

admitted under business records exception to hearsay rule at trial and Government had not argued admissions theory to trial court, since both evidentiary rules served the same purpose—to permit introduction of evidence proving truth of matter asserted. Fed.Rules Evid.Rules 801(d)(2), 803(6), 28 U.S.C.A.

2. Criminal Law —409(3)

Government laid sufficient foundation for admission of receipts given by taxpayer in prosecution for tax evasion, as admissions of party opponent, where taxpayer's initials were written at the bottom of several of the receipts. Fed.Rules Evid.Rule 801(d)(2)(A), 28 U.S.C.A.

3. Criminal Law—681(1)

Evidence was admissible as admission of party opponent, though testimony providing foundation was not given until after evidence had already been admitted. Fed.Rules Evid.Rule 801(d)(2)(A), 28 U.S.C.A.

4. Criminal Law —662.7

Tax evasion defendant's right to cross-examination was not improperly restricted, in violation of his right to confrontation, though court precluded defendant from mentioning discrepancy between grand jury and trial testimony regarding Government's estimation of defendant's financial health, in that defendant was not otherwise prevented from exposing inadequacies of Government's investigation. U.S.C.A. Const.Amend. 6.

Michael J. Rosen, Miami, Fla., for defendant-appellant.

Leon B. Kellner, U.S. Atty., Miami, Fla., Michael Paup, Chief, Appellate Section, Tax Div., U.S. Dept. of Justice, Michael C. Durney, Tax Div., Dept. of Justice, Robert E. Lindsay, Gail Brodfuehrer, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge,
KRAVITCH, Circuit Judge, and
HENDERSON, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

I. BACKGROUND

James Williams was convicted of income tax evasion in violation of 26 U.S.C. § 7201 and of signing a false tax return in violation of 26 U.S.C. § 7206(1). At trial, the government proceeded against Williams under what is commonly referred to as the "net worth" method of proof. In a net worth case, the government attempts to prove tax evasion through circumstantial evidence, by showing an increase in the defendant's net worth from a starting point to a finishing point, and by demonstrating that unreported taxable income was responsible for the increase. *See generally Holland v. United States*, 348 U.S. 121, 124-29, 75 S.Ct. 127, 129-32, 99 L.Ed. 150 (1954). In particular, the government must demonstrate that the "likely source" of the accretion

in net worth was taxable income, not nontaxable sources such as gifts, loans, and inheritances. *Id.* at 137-38, 75 S.Ct. at 136.

In this case, the government sought to prove that the likely source of Williams' unreported income was the cash generated in bingo operations run by Williams through two corporations. Williams and his employees conducted bingo games that were sponsored by several different charities. Under the agreements between Williams and the charities, each sponsoring charity would receive $150 per bingo session, regardless of the number of people who participated in any particular game. After each session, the sponsoring charity would receive a yellow sheet of carbon paper entitled "Income and Expense Report," stating the gross receipts, expenses paid, and net proceeds. Every yellow sheet introduced by the government at trial listed $150 as the net proceeds for the session, even though the gross proceeds fluctuated.

According to the government, the money obtained from these bingo games, less the $150 turned over to the charities after each game, funded an increase in Williams' net worth from 1979 to 1982. The government used December 31, 1978 as a starting point because Williams was adjudicated bankrupt on April 9, 1979, and the government was able to use the bankruptcy records to determine Williams' assets and liabilities at the beginning of 1979. To show that Williams enjoyed an increase in net worth by 1982, the government demonstrated that Williams or his bookkeeper, Marian Sandridge, deposited cash in a bank account of the Center Construction Company, another corporation

controlled by Williams. This account was coded "492" by Williams and Sandridge.

The government also attributed to Williams two mortgages receivable, a condominium in California held in the name of Williams' wife, two joint bank accounts held by Williams and his wife, and a boat. The government attributed the condominium to Williams rather than his wife because Williams' wife was a homemaker who, the government argued, had no source of income sufficient to allow the purchase of a condominium. The check for the down payment on the condominium was drawn from the joint bank account, and mortgage payments were made either by checks from the "492" account or by cashier's checks purchased with cash in amounts too large to be attributable to Williams' wife. The government attributed the boat to Williams rather than to his businesses because the boat was kept at Williams' house, and the government could discern no reason why Williams' business operations would need a boat.

Williams defended on the theory that observable increases in his wealth derived from nontaxable sources such as large loans from Williams' father and large cash gifts to Williams' wife from her parents. Williams also argued that he had a lifetime habit of borrowing and repaying substantial sums of money from acquaintances, and that he had borrowed money during the period covered by the indictment. Williams contended that the cash deposits to the "492" account reflected the funds that Williams had borrowed from relatives and friends and had, in turn, lent to his businesses.

II. EVIDENTIARY RULINGS

A.

On appeal, Williams challenges several evidentiary rulings. Williams first argues that the trial court should not have admitted into evidence the carbon "Income and Expense Reports," or yellow sheets, that reflected each bingo session's gross proceeds, expenses, and net proceeds of $150 paid to the sponsoring charity. The government introduced the yellow sheets under the "business records" exception to the hearsay rule, Fed.R.Evid. 803(6).[1] The government sought to introduce the yellow sheets not as business records of Williams' operations, but as records of the Paralyzed Veterans' Association (PVA), one of the sponsoring charities. The prosecutor attempted to lay a foundation for the yellow sheets through the testimony of Lawrence Seymour, an

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[1]Fed.R.Evid. 803(6) provides that the hearsay rule does not exclude the following:

> (6) Records of regularly conducted activity
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> A memorandum, report, record, or data compilation in any form, of acts, events, conditions, opinions, diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

administrative assistant for the PVA. Seymour's testimony suggested, however, that he did not make out the originals to the yellow sheets and that he had no personal knowledge of the accuracy of the yellow sheets. Williams' attorney objected to the introduction of the yellow sheets for lack of the foundation required by Rule 803(6). The court overruled the objection, holding that the yellow sheets were in "substantial compliance" with Rule 803(6).

On appeal, the government largely concedes that the yellow sheets were not admissible under Rule 803(6). The government contends, however, that we should nonetheless affirm because the reports were admissible as admissions by a party-opponent, either by Williams himself under Fed.R.Evid. 801(d)(2)(A),[2] or by Williams' agents, under Fed.R.Evid. 801(d)(2)(D).[3] Williams replies that the government should not now be permitted to advance a theory of admissibility that it never relied on, and that the district court never ruled on, at trial.

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[2]Fed.R.Evid. 801(d)(2)(A) provides:

A statement is not hearsay if—

The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity. . . .

[3]Fed.R.Evid. 801(d)(2)(D) provides:

A statement is not hearsay if—

The statement is offered against a party and is . . . (D) a statement made by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship. . . .

Williams further argues that the yellow sheets are not admissible under Rule 801(d)(2) for lack of a foundation.

Under some circumstances, when a trial court incorrectly admits evidence over the well-founded objection of a defendant, the court of appeals should not affirm the conviction even though the evidence was admissible on another theory not pressed below.[4] In *Shepard v. United States,* 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933), the Supreme Court reversed the murder conviction of an army major based largely on his wife's statement, made prior to her death, that "Dr. Shepard has poisoned me." The Supreme Court held that this statement was not admissible under the "dying declarations" exception to the hearsay rule because Mrs. Shepard had not made the statement in the shadow of imminent death.[5] *Id.* at 100-01, 54 S.Ct. at 24. The government alternatively argued to the Supreme Court that the statement was admissible to show Mrs. Shepard's state of mind; the statement could rebut the

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[4]This case does not implicate the well established rule that "a specific objection made on the wrong grounds and overruled precludes a party from raising a specific objection on other, tenable grounds on appeal." 1 J. Weinstein & M. Berger, *Weinstein's Evidence* 103-25 to -26 (1987). In this case, Williams presented a tenable objection to the introduction of the yellow sheets at trial, and the trial court incorrectly overruled the objection. Here the government requests us to affirm the trial court on grounds not presented below.

[5]The current version of the "dying declarations" exception, Fed.R.Evid. 804(b)(2), is considerably more liberal than the common-law exception applicable at the time of the *Shepard* case, but admissibility still depends on the declarant's belief that death was imminent at the time of the statement. *See* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* at 804-112.

testimony of Dr. Shepard's defense witnesses that Mrs. Shepard had been of suicidal bent. The Supreme Court refused to consider a theory advanced for the first time on appeal:

> Here the course of the trial put the defendant off his guard. The testimony was received by the trial judge and offered by the government with the plain understanding that it was to be used for an illegitimate purpose, gravely prejudicial. A trial becomes unfair if testimony thus accepted may be used in an appellate court although admitted for a different purpose, unavowed and unsuspected. Such at all events is the result when the purpose in reserve is so obscure and artificial that it would be unlikely to occur to the minds of uninstructed jurors, and even if it did, would be swallowed up and lost in the one that was disclosed.

Id. at 103, 54 S.Ct. at 25 (citation omitted); *see also United States v. Check,* 582 F.2d 668, 681-84 (2d Cir.1978) (introduction of prior consistent statements not admissible under any exception to rule against hearsay required reversal even though government argued on appeal that statements were admissible as nonhearsay verbal acts).

The *Shepard* decision, however, does not necessarily prohibit the courts of appeals from affirming the admission of evidence on grounds not advanced below under all circumstances. As the above-quoted *Shepard* excerpt indicates, the basic unfairness in that case derived from the government's attempt to justify the

admission of Mrs. Shepard's statement on a theory wholly unrelated to the ground advanced at trial.

The Second and Third Circuits have held the the *Shepard* rationale does not apply when the evidentiary grounds relied on by the government at trial and on appeal serve the same purpose. In *United States v. Rosenstein,* 474 F.2d 705 (2d Cir.1973), the government introduced documents at trial under the business records exception to the hearsay rule. The Second Circuit concluded that the documents were not properly admitted under that exception because the government had introduced no testimony by anyone familiar with the business practice to the effect that the records were made as part of that practice. *Id.* at 710. Nonetheless, the Second Circuit held that the documents could have been admitted as admissions of the defendant. *Shepard* did not require reversal, for both justifications for the admission of the documents served the same purpose, namely the establishment of the truth of the matter asserted. *Id.* at 711. The basic unfairness in *Shepard,* where the government advanced on appeal a theory wholly unlike the one presented to the trial court, was therefore not present in *Rosenstein. Accord United States v. Provenzano,* 620 F.2d 985, 993 & n. 10 (3d Cir.) (adopting reasoning of *Rosenstein*), *cert. denied,* 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980).

[1] In our view, the rule of *Rosenstein,* rather than *Shepard,* is applicable to this case. Although business documents are admissible under an exception to the rule against hearsay whereas admissions of a party may be introduced as nonhearsay, both evidentiary rules serve the same purpose—to permit the introduction of

evidence proving the truth of the matter asserted. *See Rosenstein,* 474 F.2d at 711. Here the government relied on the yellow sheets to establish that Williams' bingo games always remitted $150 to the sponsoring charity, regardless of the amount of the gross receipts. Either Rule 803(6) or Rule 801(d)(2) could have supported the introduction of the yellow sheets, had the government laid a proper foundation.[6] Moreover, the connection between the two rules is not all obscure; much evidence can be introduced either as a business record or as the admission of a party opponent. *Cf. United States v. Evans,* 572 F.2d 455, 488 (5th Cir.) (entries on pocket appointment calendars probably admissible under both theories), *cert. denied,* 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978).[7]

[2] Williams argues, however, that the yellow sheets were not admissible as admissions by a party-opponent under Rule 801(d)(2) because the government never laid a foundation for them under that theory. Williams points out that admissions by the agent of a party-opponent require, as a foundation, some proof of the ageny relationship. *See United States v. Pacelli,* 491 F.2d 1108, 1117 (2d Cir.), *cert. denied,* 419 U.S. 826, 95 S.Ct. 43, 42 L.Ed.2d 49 (1974). In this case, however,

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[6]The government might have been able to rely on Rule 803(6) to introduce the yellow sheets as business records of Williams' bingo operations, if it had introduced the testimony of a witness with personal knowledge that Williams or his employees compiled the yellow sheets as a matter of regular practice.

[7]The Eleventh Circuit, in the in banc decision *Bonner v. City of Prichard,* 661, F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

the government did not have to rely on Rule 801(d)(2)(D), for the yellow sheets could have been admitted as admissions of Williams himself under Rule 801(d)(2)(A). Several of the sheets bore what appeared to be the initials "JW" or "J" at the bottom. When asked whose initials were at the bottom of the yellow sheets, Marian Sandridge, Williams' bookkeeper, replied, "JW looks like James Williams." Sandridge also testified that the initials appeared to be in Williams' handwriting. This testimony provided a foundation for the introduction of the yellow sheets as Williams' admissions.

[3] Nor is it fatal to the admissibility of the yellow sheets that Sandridge's testimony provided the foundation after the evidence was already admitted. If the government had actually proceeded under Rule 801(d)(2)(A), the trial court could have permitted it to introduce the evidence before laying the foundation. As the Supreme Court has explained, the order of proof in a trial is in the discretion of the trial court. *See Geders v. United States,* 425 U.S. 80, 86, 96 S.Ct. 1330, 1334, 47 L.Ed.2d (1976); *Goldsby v. United States,* 160 U.S. 70, 74, 16 S.Ct. 216, 218, 40 L.Ed. 343 (1895).[8] This court

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[8]We do not read the Supreme Court's statement in *Bourjaily v. United States,* ___U.S.___, 107 S.Ct. 2775, 2778, 97 L.Ed.2d 144 (1987), that "[b]efore admitting a co-conspirator's statement over an objection that it does not qualify under Rule 108(d)(2)(E), a court must be satisfied that the statement actually falls within the definition of the rule," as overruling this settled principle. In *Bourjaily,* the Court clearly used the word "before" in a conceptual, not a chronological sense. It remains true that the admissibility of statements under Rule 801(d)(2) depends on the showing of the existence of a conspiracy, but in our view *Bourjaily* did not establish a strict requirement that demonstration of the conspiracy occur prior in time to the introduction of the admission at trial.

has upheld convictions returned after trials in which the prosecution introduced admissions of a co-conspirator under Fed.R.Evid. 801(d)(2)(E) before making the required showing that the conspiracy embraced both the defendant and the declarant and that the statement was made in furtherance of the conspiracy. *See, e.g., United States v. Haimowitz,* 725 F.2d 1561, 1575 (11th Cir.) *cert. denied,* 469 U.S. 1072, 105 S.Ct. 563, 83 L.Ed.2d 504 (1984).[9] Although the need for flexibility in the order of proof may be particularly great when a party seeks to introduce the statement as a co-conspirator's statement, in that the existence of a conspiracy may not be provable until later in the trial,

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[9]In *United States v. James,* 590 F.2d 575 (5th Cir.) (en banc), *cert. denied,* 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), the Former Fifth Circuit held that the admission of a co-conspirator's statement under Fed.R.Evid. 801(d)(2)(E) depends on a showing (1) that there was a conspiracy; (2) that the statements were made during the course of and in furtherance of the conspiracy; and (3) that the declarant and the party-opponent were members of the conspiracy. *See James,* 590 F.2d at 578. The court further held that the trial judge, not the jury, must determine the admissibility of co-conspirator statements. *Id.* at 580. Although the court noted that it was preferable for the trial court to require the showing of a conspiracy and the connection of the defendant with it before admitting the statements, the court stated that "[i]f [the trial court] determines that it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up." *Id.* If the trial court concludes at the end of trial, after admitting a co-conspirator statement into evidence, that the prosecution has not borne its burden of proof on the issue of admissibility, the court must decide whether the prejudice arising from the erroneous admission can be cured by a cautionary instruction to the jury or whether a mistrial is required. *Id.* at 583.

[Footnote Continued on Next Page]

the need for flexibility in the introduction of a party-opponent's admission is not so negligible as to warrant an iron rule of chronological offer of proof. We conclude that Sandridge's testimony provided a sufficient foundation for the introduction of the yellow sheets as Williams' admissions under Fed.R.Evid. 801(d)(2)(A).[10]

B.

[4] Williams further contends that the trial court violated his rights under the confrontation clause of the sixth amendment[11] by improperly restricting his cross-examination of Klaus Hurme, the government's special agent responsible for the investigation of his case. The government relied heavily on Hurme's testimony to

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(Footnote 9 Continued)

In *James*, the court further held that the trial court may not consider the co-conspirator statement itself when deciding whether the government has met the conditions of admissibility. *See James*, 590 F.2d at 581 ("[F]ulfillment of the conditions of admissibility must be established by evidence independent of the coconspirator statement itself."). The Supreme Court has since disapproved this aspect of *James* and has held that a trial court may consider the statement itself when deciding on its admissibility. *See Bourjaily*, 107 S.Ct. at 2779-81.

[10]Some of the yellow sheets were subscribed merely with an "X" rather than "J" or "JW." Even if Sandridge's testimony did not provide a sufficient foundation for the introduction of these sheets, their admission was harmless error, for enough yellow sheets were admitted with Williams' subscription to sustain the conviction.

[11]"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI.

prove Williams' taxable and nontaxable sources of income. Hurme testified about the investigation into Williams' financial affairs undertaken to establish a case against Williams.

Before Williams' indictment, Hurme had testified to the grand jury that Williams' taxable income for the years 1979, 1980, and 1981 was $337.00, $239,370.00, and $182,661.00, respectively. The first indictment returned against Williams reflected these figures. By the time the case reached trial, the indictment had been twice amended. The last amended indictment alleged that Williams sustained a loss of $21,329.00 in 1979 and had taxable income of $161,012.00 in 1980 and $155,961.00 in 1981. The government thus went to trial with a significantly diminished estimation of Williams' financial health. Williams argued to the trial court that this considerable reduction in the government's allegation of Williams' taxable income suggested troubling deficiencies in the government's investigation of Williams' affairs.

Williams' attorney sought to confront Hurme with the testimony, including the precise figures of Williams' income, that Hurme had given to the grand jury. The court, however, accepted the government's argument that the precise figures presented to the grand jury were irrelevant because the government did not have to prove the exact amount of tax due and owing in tax evasion cases such as this one. *See United States v. Johnson*, 319 U.S. 503, 517-18, 63 S.Ct. 1233, 1240, 87 L.Ed. 1546 (1943). The trial court precluded Williams' attorney from mentioning the figures given to the grand jury. Williams now argues that this restriction requires reversal.

Unquestionably the main purpose of the confrontation clause is to secure to defendants the opportunity for cross-examination. *Kentrucky v. Stincer,* ____U.S.____, 107 S.Ct. 2658, 2664, 96 L.Ed.2d 631 (1987); *Davis v. Alaska,* 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1109-10, 39 L.Ed.2d 347 (1974). Nonetheless, trial judges retain wide latitude to impose reasonable limits on cross-examination to prevent interrogation that is confusing, repetitive, or marginally relevant. *See Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [the] infirmities [in a witness' testimony] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Delaware v. Fensterer,* 474 U.S. 15, 106 S.Ct. 292, 296, 88 LEd.2d 15 (1985) (per curiam); *accord United States v. Burke,* 738 F.2d 1225, 1227 (11th Cir.1984).

Here the trial court's ruling did not prevent Williams' attorney from exposing the inadequacies of Hurme's investigation. As the record reveals, the government's objection went only to mention of the precise figures given to the grand jury. The prosecutor specifically stated that Williams' attorney could ask Hurme if he had changed his mind about the attribution of any assets during the course of the investigation:

> MR. GOLD: If he wants to ask if he is now not including—I don't have a problem with this, if Mike wants to ask the following question: Have

you always included each of these assets all along the way? That is fine. The numbers aren't important.

If he wants to say, is he no longer attributing an asset that used to be attributed, I have no problem with that. That would go to his testimony. In terms of any numbers, that is different. If he wants to say, have you ever changed your mind about including the co[n]do; have you ever changed you mind about including Genie Investment, I think that is proper.

The numbers themselves, the only numbers that count are the ones presented here to the jury.

These remarks by the prosecutor convince us that Williams had ample opportunity through cross-examination to expose the infirmities of Hurme's investigation. By asking Hurme whether he had changed his assessment of Williams' net worth at any time, Williams' attorney could have effectively demonstrated the instability of the government's case to the jury. "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer,* 106 S.Ct. at 295.

Moreover, Williams' attorney did question Hurme extensively about the gaps in his investigation. Counsel asked Hurme (1) whether he had talked to Williams'

father; (2) whether he had questioned Williams' parents-in-law; (3) whether Hurme knew that Williams' mother-in-law had given cash to her daughter; (4) whether Hurme had discovered mistakes in the bookkeeping of Williams' companies; (5) whether Hurme tried to contact all persons who might have lent Williams money; (6) whether Hurme had considered the possibility that Williams might have borrowed money and in turn lent this money to his companies; (7) whether Hurme discovered that Williams' wife had declared the mortgages receivable characterized by the prosecution as Williams' assets on her own tax return; (8) whether Hurme had examined Williams' father's will to see if the will contained a debt forgiveness clause; and (9) whether Hurme knew that Williams' father owned tax-free bearer municipal bonds that would not have appeared on Williams' father's tax returns. Taken together, these questions and answers certainly tested the issue of the adequacy of Hurme's investigation. "The sixth amendment confrontation clause is satisfied where sufficient information is elicited from the witness from which the jury can adequately gauge the witness' credibility." *United States v. Burke,* 738 F.2d at 1227. We conclude therefore that the trial court's restriction of Willams' cross-examination of Hurme did not violate the confrontation clause.

III.

We also have considered Williams' contentions that the testimony of the government's expert witness was incompetent, irrelevant, and unduly prejudicial; that the trial court erred in refusing to give a requested jury instruction on Williams' habit of borrowing money; and

that Williams' trial violated the double jeopardy clause of the fifth amendment because the trial court improperly declared a mistrial on the government's request at the first trial. We find no merit to these claims.

Accordingly, the judgment of conviction is AFFIRMED.

APPENDIX B

[FILED MAY 2 — 1988]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-5290

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES L. WILLIAMS,

Defendant-Appellant.

Appeal from the Unites States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion February 17, 11 Cir., 1988, ____ F.2d ____).

(MAY 2, 1988)

Before RONEY, Chief Judge, KRAVITCH, Circuit Judge and HENDERSON, Senior Circuit Judge

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

ORD-42

APPENDIX C

[FILED APR 8 1987]

United States District Court for
SOUTHERN DISTRICT OF FLORIDA

DOCKET NO 86-6059-Cr-PAINE-1

United States of America

vs.

JAMES L. WILLIAMS
(Address: 500 N.E. Spanish Trail,
Boca Raton, Florida 33432)

Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date April 3, 1987

COUNSEL

WITH COUNSEL Michael J. Rosen, Esq.

PLEA

NOT GUILTY

FINDING & JUDGMENT

There being a verdict of GUILTY. Defendant has been convicted as charged of the offense(s) of COUNT ONE: Signing a false income tax return, in violation of Title 26 USC §7206(1). COUNT TWO: Income tax evasion, in violation of Title 26 USC §7201. COUNT THREE: Income tax evasion, in violation of Title 26 USC §7201.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS or until otherwise discharged as to Count One, TWO (2) YEARS, or until otherwise discharged as to Count Two, said sentence on Count Two to run consecutively to the sentence on Count One.

IT IS FURTHER ORDERED AND ADJUDGED that imposition of sentence of confinement as to Count Three is hereby suspended, and the defendant placed on probation for a period of five (5) YEARS under the Standing Conditions of Probation. Such period of probation shall be consecutive to the sentence imposed on Counts One and Two, including any parole or other supervision time.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant shall pay the following fines to the United States of America: $5,000.00 as to Count One, $10,000.00 as to Count Two and $10,000.00 as to Count Three, tatalling $25,000.00. Said amount is payable to Clerk, U.S. District Court, Financial Section, 301 North Miami Avenue, Miami, Florida. 33128.

SPECIAL CONDITIONS OF PROBATION

IT IS FURTHER ORDERED AND ADJUDGED that as a special condition of probation the defendant shall contribute 100 hours per year during the five year probation period of community service, under the direction of the probation officer.

IT IS FURTHER ORDERED AND ADJUDGED that imposition of sentence of confinement shall be deferred until the Bureau of Prisons informs the defendant of the place and date to commence service of sentence, on which date, prior to 2:00 P.M., the defendant shall voluntarily surrender himself to the designated institution.

(Aggregate sentence; 4 years' imprisonment, $25,000.00 fine and 5 years probation)

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of

probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, that the defendant be placed at Eglin.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

U.S. District Judge James C. Paine Date April 8, 1987.

Supreme Court, U.S.
FILED
NOV 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-95

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES L. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
GARY R. ALLEN
ROBERT E. LINDSAY
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QUESTION PRESENTED

Whether the court of appeals erred by relying on a theory not advanced at trial to affirm the district court's admission of documents into evidence.

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No. 88-95

JAMES L. WILLIAMS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 837 F.2d 1009.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1988. A petition for rehearing was denied on May 2, 1988 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on June 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of income tax evasion, in violation of 26 U.S.C. 7201, and signing a false income tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to a four-year term of imprisonment and a $25,000 fine.

At trial, the government chose to proceed against petitioner by the "net worth" method of proof (Pet. App. A3). The government established the likely source of petitioner's increase in net worth by showing that two corporations controlled by petitioner generated large amounts of revenue by conducting bingo games on behalf of charities. Despite significant fluctuations in attendance at the games, the sponsoring charity received only $150 for each session. That sum was listed as the net proceeds of each session on the Income and Expense Report submitted by petitioner to the charity (*id.* at A4). The government also introduced evidence that petitioner misrepresented the gross income and expenses for the bingo sessions. That evidence included testimony that the Income and Expense Reports submitted to the charities overstated the rent paid on the bingo halls by about $385,000 per year (10 Tr. 440-452; 11 Tr. 747-750).

2. On appeal, petitioner contended that the trial court erred by admitting the Income and Expense Reports under the "business records" exception to the hearsay rule, Fed. R. Evid. 803(6). In its brief on appeal, the government conceded that the reports were not admissible on that theory, but urged that the reports were admissible as admissions by Williams or his agents, under Fed. R. Evid. 801(d)(2)(A) and 801(d)(2)(D). The court of appeals agreed with the government that the reports were admissible on those grounds (Pet. App. A6-A14).

The court rejected petitioner's argument that it was improper for the government to rely on an evidentiary theory not advanced below. The court noted that on either the theory accepted at trial or the theory advanced on appeal, the reports were admissible for the truth of their contents (Pet. App. A10-A11). Moreover, the court held that there was no unfairness in upholding the admission of the reports on a new theory, because the record established a

sufficient foundation for the admission of the reports as party admissions (*id.* at A11-A12). In particular, the court noted that petitioner's bookkeeper had testified that the initials "J" or "JW" on several of the papers appeared to be in petitioner's handwriting, which provided a sufficient foundation for the admission of the reports under Fed. R. Evid. 801(d)(2) (Pet. App. A12).

ARGUMENT

Petitioner renews his claim that the court of appeals erred by upholding the admission of the reports on a theory not presented to the trial court.

1. This case falls within the general rule that a trial court's decision to admit evidence will not be reversed where there exists any proper basis for its admission. See, *e.g.*, *United States* v. *Moore*, 748 F.2d 246, 248 (5th Cir. 1984); *United States* v. *Burnette*, 698 F.2d 1038, 1048 (9th Cir.), cert. denied, 461 U.S. 936 (1983); *United States* v. *Evans*, 572 F.2d 455, 488 (5th Cir.), cert. denied, 439 U.S. 870 (1978). Cf. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). In *Shepard* v. *United States*, 290 U.S. 96 (1933), this Court recognized an exception to that general rule, but the court of appeals properly held the *Shepard* exception inapplicable to this case.

In *Shepard*, a murder case, the court of appeals held that the trial court had erroneously admitted as a dying declaration the victim's out-of-court statement that "Dr. Shepard has poisoned me." The court of appeals nonetheless upheld the admission of that statement under the state of mind exception to the hearsay rule (290 U.S. at 98-100). This Court reversed, holding that the admission of the evidence at trial could not be justified on the ground cited by the court of appeals. The Court held that the evidence would not have been admissible under the state of mind

exception because it did not reflect the victim's state of mind in any respect that was material to the issues in dispute at trial (290 U.S. at 103-104). In any event, the Court held, the admission of the evidence as a dying declaration permitted the jury to use the evidence for any purpose, while the admission of the evidence to show the victim's state of mind would not have permitted the jury to consider the statement for its truth, even though it would have been almost impossible for the jurors not to do so (290 U.S. at 102-103). Therefore, the Court concluded, the court of appeals erred by relying on the state of mind exception, because the evidence had been admitted at trial for a purpose broader than would have been permitted under the theory embraced by the court of appeals.

In this case, unlike *Shepard,* the evidentiary rule on which the trial court relied and the rule relied on by the court of appeals were closely related. Both rules permitted the jury to consider the contents of the statements for their truth, and there was no risk under either rule that the jury might consider the statements for a forbidden purpose. At trial, the jury was permitted to consider the reports to show that profits skimmed from the bingo operations were the likely source of petitioner's increase in net worth. Had the reports been admitted as party admissions, the jury could have considered them for exactly the same purpose. Accordingly, the unfairness that the Court identified in *Shepard* is not present here.

For the same reason, the decision of the court of appeals does not conflict with the decision of the Second Circuit in *United States* v. *Check,* 582 F.2d 668 (1978). In *Check,* the court of appeals held that the trial court erred by admitting the out-of-court statements of a police officer as prior consistent statements of the witness. The court then rejected the government's assertion on appeal that the

testimony was admissible for the more limited purpose of aiding the jury in understanding background events (*id.* at 680-681). In *Check*, as in *Shepard*, the purpose for which the evidence was offered, received, and considered by the jury at trial was much broader than would have been permitted under the theory the government advanced on appeal.

This case does not resemble *Check*, but instead resembles the Second Circuit's earlier decision in *United States* v. *Rosenstein*, 474 F.2d 705 (1973). In *Rosenstein*, the trial court improperly admitted evidence under the "business records" exception. The court of appeals sustained the admission of the evidence on other grounds—as a party admission or a co-conspirator declaration. The court explained that *Shepard* was "clearly distinguishable" (*id.* at 711), because "[h]ere there is no difference in the *purpose* for which the evidence is sought to be admitted on the alternative grounds. The purpose * * * is to establish the truth of that which is contained in the declaration" (*id.* at 710). The reasoning in *Rosenstein* applies directly to the instant case, where, similarly, there was no difference in the purpose for which the evidence could be used under the theory adopted on appeal and the purpose for which it could be used under the theory adopted at trial.

2. Nor does the decision below conflict with this Court's decison in *Giordenello* v. *United States*, 357 U.S. 480 (1958). At trial in that case, the government relied on the validity of an arrest warrant to introduce evidence seized at the time of the defendant's arrest (*id.* at 487). On review, this Court held the arrest warrant invalid (*id.* at 486-487). The Court declined to affirm the admission of the evidence on the government's theory, not advanced at trial, that the arrest was valid because it was supported by probable cause to believe the defendant had committed a felony. The Court explained that "[t]o permit the govern-

ment to inject its new theory into the case at this stage would unfairly deprive the petitioner of an adequate opportunity to respond" (*id.* at 488), since the defendant had no reason at trial "to rebut the contentions that the Government makes here for the first time" (*ibid.*).

There was no such prejudice to petitioner in the instant case. This is not a case like *Giordenello,* in which the foundation for the admission of the evidence (a finding of probable cause) was not offered at trial. In this case, the court of appeals based its decision that the reports were admissible as party admissions on foundation evidence that was presented at trial and made a prominent part of the government's proof. In particular, the court of appeals relied on the testimony of petitioner's bookkeeper as to the identity of the handwriting on the reports. In addition, other evidence connected petitioner to the reports that were submitted to the charities. Thus, petitioner was aware that the government was attempting to connect him to those documents, and he had every incentive and opportunity to rebut the government's showing. Accordingly, there is no merit in petitioner's assertion (Pet. 4-5, 10-11) that the court of appeals' decision violated his Fifth and Sixth Amendment rights by depriving him of the opportunity to disprove the factual foundation for the admission of the reports.

Nor does *United States* v. *Ordonez,* 737 F.2d 793 (9th Cir. 1983), support petitioner's position. In *Ordonez,* the Ninth Circuit found that the government failed to establish *any* foundation for the admission of certain ledger entries under either Fed. R. Evid. 801(d)(2) or 803(6). In this case, by contrast, the court of appeals correctly determined that the bookkeeper's testimony established a sufficient foundation for the introduction of the Income and Expense Reports as admissions by peti-

tioner under Fed. R. Evid. 801(d)(2)(A). See Fed. R. Evid. 901(a), 901(b)(2).

3. In any event, even if the admission of the reports was erroneous, the error was harmless. The evidence at trial, apart from the reports, firmly established that petitioner received substantial unreported income from the bingo sessions. Government experts testified that the net proceeds from the bingo games were far greater than the $150 reported by petitioner (10 Tr. 440-452). Employees of the charities testified that the charities always received $150 per session regardless of the number of people in attendance (9 Tr. 358, 380-382). Testimony of petitioner's bookkeeper, corroborated by petitioner's tax returns (10 Tr. 747-750), indicated that petitioner dramatically overstated business expenses from the bingo sessions in reports to the sponsoring charities. And the evidence established substantial unexplained cash deposits during the same period to an account maintained in the name of a corporation controlled by petitioner.

In addition, while the government is allowed to prove tax evasion on the net worth theory by demonstrating a likely source of taxable income, see *Holland* v. *United States,* 348 U.S. 121, 138 (1954), it is also entitled to rely entirely on evidence negating nontaxable sources of income, see *United States* v. *Massei,* 355 U.S. 595 (1958). In this case, the government presented compelling evidence ruling out the receipt of income from nontaxable sources without relying at all on the bingo game reports.* Thus, even assuming the admission of the disputed evidence was error, the error was harmless.

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* The government negated all nontaxable sources of income (*i.e.*, gifts, inheritances, insurance proceeds, and loans) by contacting petitioner's business associates, relatives, and friends (12 Tr. 838-840, 888-891, 900-904). It also rebutted petitioner's primary defense at trial

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
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WILLIAM S. ROSE, JR.
Assistant Attorney General
GARY R. ALLEN
ROBERT E. LINDSAY
GAIL BRODFUEHRER
Attorneys

NOVEMBER 1988

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that nontaxable loans and cash gifts from specified relatives and acquaintances were the source of deposits to his corporate bank account (Pet. App. A5) by establishing a lack of documentation for the alleged loans (14 Tr. 1335-1339, 1378-1381; 15 Tr. 1431-1436, 1575), and the alleged lenders' lack of financial resources to make the loans (10 Tr. 529-530, 550; 11 Tr. 771-772; 12 Tr. 902-909; 15 Tr. 1416-1423, 1569-1570). The government also introduced evidence contradicting testimony by petitioner's mother-in-law that she gave her daughter substantial cash gifts (9 Tr. 309-312; 12 Tr. 894-895; 13 Tr. 1062; 15 Tr. 1445-1451).

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60743